



Demystifying Family Law: Supporting Clients Experiencing Family Breakdown to Assert their Rights

OCASI Conference 2007

A Legal Workshop Presented By:

Lisa Cirillo

Legal & Project Coordinator

FLEW (Family Law Education
for Women)

c/o YWCA Toronto

80 Woodlawn Ave E Toronto

ON M4T 1C1

T 416 961 8101 x 317

C 416 712 8858

F 416 961 7739

lcirillo@ywcatoronto.org

www.familylawforwomen.com

Clara Ho

Legal Director

METRAC (the Metropolitan
Action Committee on
Violence Against Women
and Children)

158 Spadina Road,

Toronto ON, M5R 2T8

Reception: 416-392-3135 |
416 392-3031

(TTY) | 1-877-558-5570

Fax 416-392-3136

Direct Line: 416-392-3148

Workshop Outline

- Introductions
- Myths & Realities Exercise
- Introduction to VAW literature and theory
- Overview of key areas of family law
- Overview of key areas of immigration law as they impact on family law matters
- Family law arbitrations & recent legislative changes
- Where to go for family law assistance

Overview of Family Law

- Common issues on family breakdown
- Different ways to resolve family law issues
- Overview of different family courts – where to go for which claim
- Key legal rights / responsibilities in family law

Common Issues on Family Breakdown

- ✓ living arrangements and visiting schedule for the children
- ✓ financial support
- ✓ protection from abusive partner?
- division of property, including the home
- ✓ immigration complications
- if history of abuse, there may be criminal and / or child protection issues

Resolving Family Law Disputes

- informal arrangements reached by the couple themselves - may be oral or in writing
- various forms of **alternative dispute resolution (ADR)** – i.e. negotiations and/or mediation, which may result in a **settlement agreement** and/or a **parenting plan**
- could try arbitration, another form of ADR, which would result in an binding order
- going to court

A.D.R. in Family Matters

4 main kinds of ADR in family matters:

- **negotiation** – process by which people attempt to resolve the issues through a series of discussions. Can be done by parties themselves or their lawyers
- **mediation** - discussion between the parties is facilitated by trained third party, which can offer suggestions but not advice, and who must remain impartial. If not agreement reached, process is abandoned.
- **arbitration** - couple selects a third party to act as decision-maker over the dispute. Each side presents their case, and at end of process, the arbitrator will make a legally binding order.
- **collaborative family law** - couple and their lawyers work together, in cooperation, to resolve the issues. If the couple is unable to reach an agreement, the lawyers who assisted them in the collaborative discussions must withdraw and cannot represent them if the matter goes to court.

Advantages and Disadvantages of ADR in Family Law Matters

Advantages:

- parties have more control over process and outcome
- usually faster and less expensive than going to court
- less hostile than litigation – this is especially important if parties have to continue to co-parent

Disadvantages:

- not appropriate where there is history of abuse, intimidation or power imbalance
- cost can be a barrier - legal aid is not available for arbitration or collaborative family law

Family Court Systems in Ontario

Three levels of court deal with family law matters in Ontario:

1. **Family Court** (formerly the Unified Family Court)
2. **Superior Court of Justice**
3. **Ontario Court of Justice**

Family Court (Unified Family Court)

- exists in 17 areas across Ontario including Barrie, Hamilton, Kingston, London, Ottawa, and Peterborough
- deals with all family law matters, including divorce, property, support, custody and access, adoption, and child protection
- model was to be extended across the province but the government ran out of funds to expand it
- in all other areas in Ontario, including the Greater Toronto Area, family law matters are divided between the Ontario Court of Justice and the Superior Court of Justice

Family Court System, cont'd.

Superior Court of Justice

- has power to grant divorce and issue orders dealing with the division of property
- can also ask the court to deal with custody, access and support as part of divorce application
- higher level court than OCJ – proceedings more formal

Ontario Court of Justice

- can issue orders dealing with custody, access and support
- also deals with adoption and child protection matters
- can not grant divorce or deal with property

Substantive Family Law Issues

- custody and access
- child support
- spousal support
- family law restraining orders

Custody & Access

- both parents have the same legal right to make decisions about the child's care and upbringing
- if parents don't live together, they have to make plans for the child's living arrangements and daily life
- parents can reach an agreement between themselves to resolve these issues.
- if they are unable to agree, either one can apply to the court for an order for **custody** and/or **access**

Custody

- custody refers to **decision-making responsibility** for the child
- parent with custody has the right to make decisions about the child's health, education, religious upbringing, etc.
- under Canadian law, term custody does not refer to where the child lives (**residency**)

Types of Custody Arrangements

Sole custody

- parent with custody has the right to make decisions about the child independently
- other parent usually has right to information
- Parent with sole custody often has **primary residency**

Custodial Arrangements, cont'd.

Joint custody

- parents make all major decisions regarding the child's health, education and upbringing together
- does not necessarily mean that child will spend equal amounts of time in each parent's household
- parents must work collaboratively, and must be able to put child's interests first
- not appropriate arrangement where there has been history of abuse, intimidation or where parents are unable to communicate with each other

Custodial Arrangements, cont'd.

Shared or split custody

- Not really a custodial arrangement like ones we have been discussing as the concept doesn't usually refer to decision-making authority
- Refers to amount of time child spends with each parent for purposes of calculating child support. If child spends at least 40% of his / her time with non-custodial parent, this can impact the calculation of child support

Access

- right of the child to spend time with non-custodial parent and right of that parent to spend time with child
- parents with access rights usually also have the right to information about the child's health, welfare and education

Access Schedules

- principle of maximum contact – access will almost always be granted
- access can be broadly worded (“reasonable and generous access upon request”) or may be set out in detailed schedule
- Access schedule may allow for increased access as child gets older

Access Schedules, cont'd.

- very rare for access to be denied outright
- even parent seeking access has had minimal contact with child, or where history of abuse and/or other issues, access is likely to be ordered
- if courts persuaded there is a serious risk of harm, may order access to be **supervised** by designated third party or at a supervised access centre

Best Interests of the Child

For all aspects of custody and access, only legal consideration is the **best interests of the child**

“best interests” is a legal test that requires the court to consider a number of factors, including:

- the love, affection and emotional ties between the child and the person seeking custody and/or access;
- the child's views and preferences;
- the length of time the child has lived in a stable home environment;
- the ability and willingness of each person applying for custody of the child to provide the child the necessities of life;
- any plans proposed for the child's care and upbringing;
- permanence and stability of proposed family unit;

Best Interests, cont'd.

- the ability of each person applying for custody of or access to the child to act as a parent;
- the relationship by blood or through an adoption order between the child and each person who is a party to the application;
- **As a result of recent changes to the law, the court now required to consider any history of abuse, including abuse directed at a spouse or any other member of the household**

Importance of Status Quo

- **“status quo”** means the current situation
- very important concept in family law
- if the current situation is working well for the child, the court will be reluctant to make dramatic changes
- for same reason, primary residency often awarded to the **primary caregiver**, the parent who has assumed the bulk of child care responsibilities before and after separation

A few process points:

- Applications concerning children must usually be brought in place where children are “**ordinarily resident**” (usually live)
- “any person” may bring an application for custody of and/or access to a child – court will use best interests of the child test to decide if order should be granted
- Orders dealing children - orders for access, custody or support - are never truly final and can be changed if there has been a significant change in circumstances

International Abduction of Children

- international abduction refers to situation in which one parent, without the other's consent or knowledge, takes the child outside Canada
- new Canadians, immigrants and refugees may be a greater risk as the abducting parent may have family and other connections outside Canada
- no absolute way to protect against it

International Abduction, cont'd.

Some important safeguards:

- custody order or agreement be as clear and detailed as possible;
- should specifically state that international travel is prohibited;
- custody order can also require that the child's passport remain with the custodial parent or be deposited with the court for safekeeping

If you suspect child has been abducted...

- contact the police **immediately**
- police will issue border alerts to the relevant countries
- call the Consular Affairs Bureau at 1-800-387-3124 or 1-800-267-6788 immediately
- Foreign Affairs Canada produces a booklet called *International Child Abductions: A Manual for Parents* - provides tips on preventing international abductions and tips on what to do if child is removed from Canada (can be viewed online at <http://www.voyage.gc.ca/>)

Recovering children who have been abducted

- **Hague Convention on the Civil Aspects of International Child Abduction** - an international treaty, signed by 75 countries who have agreed to cooperate with one another in finding and returning children which have been illegally moved from one country to another
- Convention requires the prompt return of the child to her home jurisdiction
- If country to which child has been abducted is not a signatory to the Hague Convention, situation is much more difficult
- Parents may try to use the law of the country to compel the return of the child or may attempt to negotiate with the abductor and his family

Child Support

- children have the right to be financially supported by their parents
- if the parents do not live together, they must share the costs of caring for their children as much as possible
- in most cases, the parent with whom the child lives is able to seek **child support** from the other parent

Child Support – for how long?

- child support is payable as long as the child is still considered to be **dependent**
- in most cases, until the child is 18yrs old, unless the child gets married or withdraws from parental control
- support may continue past 18 if child is unable to be financially self-supporting due to illness, disability or because she is attending school full-time

Child support - who has to pay?

- “parent” for the purposes of child support is not restricted to biological and adoptive parents
- step-parents may also be required to pay support for a child if they have acted in the role of a parent

Determining the Amount - CSG

- amount of child support to be paid is determined by a series of tables established by the government called the **Child Support Guidelines** (CSG)
- CSG apply to all applications for child support, regardless of whether the application is brought under federal or provincial law

CSG - Basic Table Amount

- amount of support to be paid is based on the non-custodial parent's gross income and the number of children covered in the application
- in many cases, basic table amount will be the amount of support payable
- there is some discretion to vary the amount up or down in certain circumstances

When do CSG not apply?

In some circumstances, the table amount will not automatically apply. For example:

- if the child is over 18;
- if the child spends at least 40% of her time with each parent;
- if each parent has a child living with them

In these situations, court will look closely into the facts of the particular situation, the parents' incomes, and the needs of the children to determine the appropriate amount of support to be paid

“Special Expenses”

- it is possible to have the amount of child support increased where there are additional **special expenses** such as day care fees, health-related expenses or educational fees
- assuming the special expenses are reasonable, parents will be expected to share the cost of the additional expense in proportion to their incomes

Undue Hardship

- the court can **reduce** the amount of support payable if payor parent can show that the table amount would cause **undue hardship**
- for example, if the payor has a disability or is under a legal obligation to support other dependents
- this is a high threshold – court will not lightly reduce support to less than the table amount

Parents on Social Assistance

When custodial parent is on social assistance:

- parents on **social assistance** are required to make reasonable efforts to get support from other parent - if they do not, their social assistance may be reduced or cancelled
- any child support received is deducted **dollar for dollar** from social assistance payment
- social assistance provider is entitled to bring an application for support & custodial parent will be expected to cooperate
- provider does have the discretion not to pursue support if other parent cannot be located or if there is a history of abuse between the parents

If payor parent is in receipt of social assistance:

- parent will still be required to pay some amount of child support if annual income is above than \$6,700.

Enforcement – Family Responsibility Office (FRO)

- child support orders are enforced by the Family Responsibility Office (FRO)
- all court orders for support are automatically filed with the FRO
- people can also file agreements about support with the FRO for enforcement
- when a support order is filed, the FRO will instruct the payor to make all payments directly to its office
- once the money is received, the FRO will forward the support to the custodial parent
- due to the FRO's high case load, delay between when an order is registered and when the recipient parent begins to receive the support money can be lengthy

Powers of FRO

- if the payor is late or misses a payment, FRO has a number of options to collect the money
- if the payor is employed, the FRO can require the employer to deduct the support from the payor's wages
- if the payor is unemployed or self-employed, it is more difficult to enforce the order – FRO can garnish money from payor's account or can register a charge against the payor's personal property (i.e. a car or home)
- if the payor is consistently late or significantly in arrears, FRO can suspend payor's driver's licence and/or cancel the payor's passport as a way of putting pressure on the payor to honour the support order

Changing the Amount

- orders regarding children are never truly final
- If both parents agree that the original amount is no longer appropriate, they can sign a new agreement reflecting the current arrangement
- if the parents are not able to agree on a new amount, either parent can ask the court to **vary** (change) the amount or the terms of the existing order
- court will only change the amount if there has been a **significant change in circumstances**. For example, if the payor's income has changed (either increased or decreased), the child's living arrangements have changed, or there are new special expenses.

Spousal Support

- spousal support is money paid by one spouse to the other to help support the poorer spouse on the breakdown of the relationship
- spousal support is dealt with separately from child support
- child support payments take priority over orders for spousal support – court will only consider order for spousal support once child support has been decided

Spousal Support, cont'd...

- spousal support can be paid in a lump sum or periodically (usually monthly)
- spousal support may be ordered for a specified amount of time, or it may continue indefinitely

Who is a “spouse”?

- both married and common law partners can make claims for spousal support
- married people can make a claim for spousal support under provincial or federal law
- common law couples who meet the definition of “spouse” under the provincial legislation can also apply
 - lived lived together continuously for at least three years; or
 - be in a relationship of some permanence and are the natural or adoptive parents of a child
- same sex couples may fit either definition

Objectives of spousal support order

- law views marriage and cohabitation relationships as economic partnerships
- when the relationship breaks down, one person is often in a better position financially than the other – this may be due to roles the spouses took on during the marriage
- person with more money may be required to help support the other spouse for a period of time
- at the same time, law expects people to try to become self-sufficient to the best of their ability within a reasonable period of time after the end of the relationship

Factors to consider in ordering spousal support

Factors to be considered in deciding whether spousal support should be awarded and the amount:

- the length of time the people lived together or were married;
- the functions performed by the spouses during that time;
- any orders, agreements or arrangements made by the spouses (for example, in a domestic contract) about support;
- behaviour, good or bad, is not a consideration in determining entitlement to spousal support

Determining the Amount - SSG

- spousal support has long been one of the challenging areas of family law
- in 2005, government introduced *Spousal Support Guidelines* (SSG)
- SSG provide expected ranges of support that take into account such factors as the length of the marriage or cohabitation, income levels, work histories of the spouses and number of children
- although the Guidelines are not law, most lawyers and judges now rely on them to determine an appropriate range of support

Enforcement

- FRO has responsibility for enforcing spousal support orders as well as child support orders
- process for filing orders, issuing payments and enforcement powers are the same as with orders for child support

Legal options for women experiencing violence

- violence is a daily reality for many women across Canada
- abuse may be physical, sexual, emotional, psychological or financial
- women experiencing abuse have several legal options open to them to try and stop the abuse
- in all cases, the primary concern should be the safety of the woman and her children

Legal options, cont'd.

Some legal options include:

- terms of release
- peace bonds
- ✓ family court restraining order

Family Law Restraining Orders

- if a woman is being threatened or abused by her partner (spouse or common law) or former partner, she can apply to the family court for a **restraining order**
- if judge is satisfied that the woman has a reasonable fear for her safety, court may impose an order restraining the partner from contacting or attempting to contact her and her family, and ordering him to stay a certain distance away from her
- order may also include such other terms as a ban on firearms
- order may be for a specified period of time or indefinite

Ex parte orders

- in emergency situations, where a woman's safety or her children's safety is immediately threatened, she can seek a temporary restraining order on an *ex parte* basis
- *ex parte* means that the woman is asking the court to grant the order before her partner is aware that she is seeking such an order
- purpose of these kinds of orders is to ensure that the woman has some protection in place before the usual court process begins.
- woman must prove a high risk of immediate harm to be successful

Breach of restraining order

- breach of a restraining order is a provincial offence
- any violation of the order should be reported to the police
- if a woman wishes to change the terms of an existing order, she must bring an application to the court

Family Law Arbitration

- as discussed earlier, arbitration is a form ADR
- arbitration, like most forms of ADR, must be entered into voluntarily.
- arbitration is a legal procedure in which the people agree to pick someone to hear the evidence; listen to both their arguments; and give a legally binding order
- orders are called **arbitral awards**

Powers of Arbitrator

- arbitrators will only deal with the issues that the participants have asked them to deal with, such as custody, access, and division of property
- arbitrators do not have the power to make orders that change a person's legal status like granting a divorce or an annulment

Family Law Statute Amendment Act, 2005

- in April 2007, the law about family law arbitrations changed significantly
- family law arbitrations now have a special status under Ontario's *Arbitration Act*
- changes are both **substantive** (changes to the actual rights) and **procedural** (changes to the process for enforcing the rights and responsibilities)

Substantive Changes

- most significant change to the law is the requirement that all family law arbitrations must follow the law of Ontario or of another Canadian jurisdiction
- any proceeding that fails to follow Canadian public family law will not be legally enforceable
- for example, under Canadian law, spouses have the right to an equal division of property on marriage breakdown
- any arbitration conducted in accordance with other doctrines such as religion or cultural principles will have no legal effect

Procedural Changes

- before entering arbitration, each person must sign an acknowledgement that he or she has received independent legal advice
- as of April 2008, all family law arbitrators will be required to undergo training in screening for domestic violence
- non-lawyer arbitrators will also be required to take training in Canadian family law and domestic violence
- awards must be in writing
- arbitrators are required to report twice a year to AG & keep records for 10 years

Arbitration vs. Private Agreements

- changes to the law do not prevent couples from discussing their family breakdown with people whom they respect such as doctors, religious leaders, etc.
- private arrangements not covered by the *Arbitration Act* and are not bound by Canadian law
- women are often pressured into agreeing to these kinds of private arrangements, which may provide less than the woman would have been entitled to under the law
- as a result of the recent changes to the *Act*, these kinds of private agreements are not legally enforceable

Where to go for legal assistance?

1. Hire a lawyer. If can't find family lawyer, can try the LSUC's Lawyer Referral Service
 - regular line: 1-900-565-4577
 - emergency line: 1 (800) 268-8326
2. Legal Aid Ontario
 - Certificate to retainer private bar lawyer or staff lawyer at FLO of RLO
 - Legal aid clinics – most do not handle family law matters (**exception Downtown Legal Services 416 935-4535**), but often have lists of local lawyers who practice family law
 - Duty counsel in courts
3. Family Law Information Centres (FLIC)
4. Barbra Schlifer Clinic (www.schlifer.com)
416.323.9149

Where to go for legal information?

- CLEO / CLEOnet (<http://www.cleo.on.ca/> and <http://www.cleonet.ca/>)
- Ministry of Attorney General (<http://www.attorneygeneral.jus.gov.on.ca/english/family/>)
- Ontario Women's Justice Network (<http://www.owjn.org/>)
- Department of Justice (<http://www.justice.gc.ca/en/index.html>)
- Ministry of Community and Social Services (<http://www.cfcs.gov.on.ca/mcss/english/mini-stry>)

Where to go for legal information,
cont'd...

FLEW (Spring 2008)

www.familylawforwomen.com

or

www.femmesetdroitdelafamille.com